Petition

81-2021

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

THOMAS FANNON AND WILLIAM JEFFREY EDWARDS,

Petitioners,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FIRST DISTRICT COURT OF APPEAL, STATE OF FLORIDA

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QUESTIONS PRESENTED

1. Whether police officers with ulterior investigatory motives but without "founded suspicion" to stop a vehicle for investigation may stop such vehicle for the alleged traffic infraction of "weaving".

2. Whether police officers with ulterior investigatory motives but without "founded suspicion" to stop a vehicle for investigation may stop such vehicle for a traffic infraction where the police testimony regarding the fact of infraction is in direct conflict.

3. Whether the Florida Drug Trafficking Law, which upon conviction requires severe mandatory minimum sentences without parole, unless in the unreviewable discretion of the prosecutor the defendant "provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals," violates the Fifth Amendment privilege against self-incrimination, and the due process clause of the Fourteenth Amendment.

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PETITION FOR WRIT OF CERTIORARI TO THE FIRST DISTRICT COURT OF APPEAL, STATE OF FLORIDA

OPINIONS BELOW

The District Court of Appeal, First District, State of Florida, affirmed the conviction of Petitioners by per curiam order without opinion. The per curiam order of affirmance is not yet officially reported and is set out in Appendix I.

JURISDICTION

The judgment and order of the District Court of Appeal, First District, State of Florida, affirming the Petitioners' conviction herein, was entered on Janu-

ary 27, 1982. A timely petition for rehearing was denied on March 1, 1982. See Appendix J. Under Article 5, § 3(b) of the Florida Constitution, this was the highest Court in the State of Florida in which decision could be had. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourth Amendment, United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment, United States Constitution:

> No person shall be . . . compelled in any criminal case to be a witness against himself . . . .

Fourteenth Amendment, United States Constitution:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

Section 893.135 of the Florida Statutes penalizes the possession or distribution of certain amounts of various controlled substances, including marijuana and cocaine. The statute is printed in its entirety in Appendix O hereto. The subsection which is the subject of this petition provides that the severe mandatory minimum sentences without parole may be reduced or suspended only as follows:

Section 893.135(3) of the Florida Statutes (1979):

> The state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if he finds that the defendant rendered such substantial assistance.

STATEMENT OF THE CASE

Petitioners seek certiorari review of the affirmance of their judgments of conviction under Section 893.135 (1)(a)2 of the Florida Statutes (1981) (hereinafter referred to as the Drug Trafficking Law), prohibiting possession of more than 2,000 pounds of cannabis.

Petitioners were originally charged by indictment, along with three other defendants (Jorge Luis Neira, Sergio Modesto Rodriguez, and Aniceto Julio Cordero) with two counts of violating the Drug Trafficking Law. This indictment was dismissed by the trial court on grounds not relevant here. The State then filed an information against the same five defendants alleging a single violation of the Drug Trafficking Law by possession of more than 10,000 pounds of cannabis.

Petitioners filed a Motion to Dismiss the information on the grounds, *inter alia*, that the Drug Trafficking Law violated the Fifth Amendment privilege against self-incrimination and the due process clause of the

Fourteenth Amendment. Petitioners also filed a Motion to Suppress the cannabis. The trial court denied these motions. (The motions and orders of the trial court are set forth in Appendices B, C, D and E.) Petitioners Fannon and Edwards then pleaded nolo contendere to a reduced charge under the Drug Trafficking Law of possession in excess of 2,000 pounds of cannabis. They were granted leave to appeal the trial court's rulings on the Motions to Suppress Evidence and to Dismiss, as permitted by Florida law. *Brown v. State,* 376 So. 2d 382 (Fla. 1979). Petitioners Fannon and Edwards were sentenced by the trial court to fifteen (15) years in prison, with a minimum mandatory term without parole of five (5) years in prison, and to pay a $50,000 fine. As to the three remaining co-defendants, the trial court indefinitely postponed any further action, pursuant to an agreement of cooperation between their defense counsel and the prosecutor.

The facts underlying the charge were as follows. At 4:20 a.m. on November 18, 1980, the dispatcher for the Taylor County Sheriff's Department received a phone call from an anonymous man who, according to the dispatcher's testimony, reported:

> That a van-type truck came out of the Yates Creek grade with no headlights on and did not come to a stop, but was headed toward town on the Beach Road. He requested that a unit be dispatched to check out this suspicious vehicle. He advised that there was other vehicles going in and out of that road, and it just didn't seem right to him. And he requested that we check it out.

(R. 74-75.)[1] The dispatcher received a similar call regarding another truck shortly thereafter. (The relevant

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[1] Record references are to the transcript of the hearing on the Motion to Suppress Evidence held on April 2, 1981.

dispatcher's testimony from the hearing on the Motion to Suppress is set forth in Appendix K.) Two Taylor County Sheriff's Deputies were dispatched to investigate. Some unspecified time later, but probably within one-half hour (R. 9), the first officer, Deputy Holly, observed a truck driving on the Beach Road toward United States Route 19. Contrary to the only detail provided in the anonymous tip, the truck observed by Deputy Holly had its headlights on (R. 32). Holly said there were houses, farms and ranches along the Beach Road. Deputy Holly turned and followed the truck along the Beach Road to its point of intersection with United States Route 19, and then continued to follow the truck for approximately three miles north on U.S. 19. Deputy Holly testified that the truck he observed was a GMC truck which appeared to be white but had a light bluish-greenish tint to it (R. 49). Holly testified that as he was following this truck for approximately five miles he noticed that the taillights were blinking on and off. He radioed Deputy Culpepper, the other Taylor County Deputy who had been dispatched, and "mentioned the lights." Deputy Culpepper told him to stop the truck (R. 50). Holly did so on U.S. 19 at a point approximately three miles north of its intersection with the Beach Road. As described *infra* two trucks were ultimately stopped: a green GMC truck and a Jartran rental truck. Deputy Holly was clear that the truck he stopped, and which the State claimed had blinking taillights, was the bluish-greenish GMC truck. (The relevant testimony of Deputy Holly regarding his stop of a truck, and his claim that it was the GMC truck, is set forth in Appendix N.)

In the meantime, Deputy Culpepper, after directing Deputy Holly to stop the first truck, saw a second truck exit from the Beach Road and turn north on U.S. 19.

Like the first truck, this truck also deviated from the only detail supplied in the anonymous tip in that it had its headlights on. Culpepper followed the truck for approximately three miles on U.S. 19 and pulled it over at the exact point where the first truck had been stopped. Culpepper testified he stopped the second truck "for weaving across the highway." United States 19 is a four-lane highway with a grass median separating the northbound and southbound lanes (R. 20-21). Culpepper subsequently described the "weaving": the truck crossed the center line from the righthand lane approximately three or four feet into the passing lane five or six times during the three miles which he followed it (R. 10, 20). (The relevant testimony of Deputy Culpepper regarding his reason for stopping the truck is set forth in Appendix L.)

Both Deputies Culpepper and Holly were clear that Petitioner Fannon drove the truck stopped by Deputy Culpepper, and that Petitioner Edwards drove the truck stopped by Deputy Holly. Further, it was clear that one truck was a green or bluish-green GMC truck and the other a Jartran rental truck (R. 21). There was an important inconsistency in the deputies' testimony, however. Both Deputies testified they stopped the GMC truck. Deputy Holly was quite clear that the truck he stopped was not a Jartran rental truck, but the GMC truck with the "bluish-greenish" tint (R. 49). This truck allegedly had the defective taillights which Deputy Holly gave as his reason for stopping the truck. Deputy Culpepper claimed, however, and the State stipulated on the record, that it was indeed Culpepper who stopped the GMC truck for "weaving" (R. 21). Hence, Deputy Holly's testimony that the green GMC truck had defective taillights, was directly contradicted by Deputy Cul-

pepper's testimony and the State's stipulation. (Deputy Culpepper's testimony and the State's stipulation are set forth in Appendix M.)

Although both deputies claimed they stopped the trucks for traffic infractions, no traffic citations were ever issued to either of the Petitioners, and no traffic proceedings were ever pursued.

The events subsequent to the stop of the trucks admittedly gave the deputies probable cause to search the trucks. The search revealed cannabis in both trucks.

The radio conversations between and among the dispatcher, Deputies Culpepper and Holly, and other law enforcement officers, were monitored by a dual tape recording system operated by the Taylor County Sheriff's Department. The defense moved for disclosure of this tape, which motion was originally resisted by the prosecution on the ground that it would possibly disclose the identity of their "anonymous caller." The trial court, however, granted the defense motion and reviewed the tape in camera. Upon listening, it was revealed that the tapes were blank. (Transcript of testimony in camera and proceedings in open court on March 21, 1981.)

Based on the above facts, the Petitioners moved to suppress the cannabis seized from the trucks on the ground that there was no founded suspicion to stop the trucks for an investigatory purpose, and that the stops were based upon pretextural traffic violations. (See Appendix Q.) The trial court denied the motion, stating only the following reason:

> The Court finds the arresting officers had probable cause to search the trucks and there were exigent circumstances so that a search warrant was not necessary.

(Appendix E.) The trial court also denied the Petitioner's Motion to Dismiss based on the unconstitutionality of the Drug Trafficking Law, in the following order:

> ORDERED AND ADJUDGED that said Motion to Dismiss is hereby denied. *See: Benitez v. State*, 395 So. 2d 514, Fla. Sup. Ct. 1981.

(Appendix C.)

As permitted by Florida law, *Brown v. State*, 376 So. 2d 382 (Fla. 1979), the Petitioners pleaded nolo contendere, were adjudicated guilty and sentenced. They appealed the trial court's rulings to the Florida First District Court of Appeal. Petitioners' arguments on appeal were as follows:

> I. THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS EVIDENCE SINCE THE STOP OF THE TRUCKS FOR CLAIMED TRAFFIC VIOLATIONS WAS A PRETEXT FOR AN UNLAWFUL INVESTIGATORY STOP.
>
> II. THE TRIAL COURT ERRED BY DENYING DEFENDANTS' MOTION TO DISMISS BASED ON THE UNCONSTITUTIONALITY OF SECTION 893.135 OF THE FLORIDA STATUTES (1979).
>
> (a) THE STATUTORY SENTENCING PROCEDURE VIOLATES DUE PROCESS OF LAW SINCE IT VESTS IN THE PROSECUTION THE UNREVIEWABLE DISCRETIONARY POWER TO DENY MITIGATION OF SENTENCE.
>
> (b) THE DRUG TRAFFICKING LAW VIOLATES THE PRIVILEGE AGAINST SELF-INCRIMINATION.

(Appellants' Brief in the Florida First District Court of Appeal, page *i.*) The appellate court affirmed per curiam without opinion and denied timely petition for rehearing. (Appendices I and J.)

REASONS FOR GRANTING THE WRIT

I.

The decision of the Florida First District Court of Appeal summarily affirming the trial court's denial of the Motion to Suppress Evidence is in conflict with the decisions of other federal and state jurisdictions, and raises an important question regarding the pretextural use of traffic infractions to stop vehicles on the open highway when there is no founded suspicion to stop a vehicle for investigatory reasons.

In *United States v. Cortez,* 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981), this Court made it clear that an investigatory stop of a vehicle by the police is subject to the restrictions of the Fourth Amendment. This Court held that such a stop could not lawfully occur unless "Based upon the whole picture the detaining officers [had] a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Id.* at 695. Regarding the application of this standard, the Court stated, "[t]his demand for specificity in the information upon which police action is predicated is *the central teaching of this Court's Fourth Amendment jurisprudence.*" (Quoting from *Terry v. Ohio,* 392 U.S. 1, 21, n.18, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).)

The protections of the *Cortez* decision are eroded to virtually the vanishing point, however, unless this Court addresses the problem of the pretextural traffic stop. The facts of the case at bar provide an excellent example of the problem. The police had received an anonymous tip of "suspicious vehicles" on the Florida coastline.

Two deputy sheriffs were dispatched with the clear purpose of investigating the trucks. Recognizing that the anonymous tip did not give them a lawful basis to stop the trucks, the deputies discovered two claimed traffic infractions which enabled them to stop the trucks at exactly the same point on the highway. One infraction, characterized as "weaving" by the officer, simply involved a truck moving from the righthand lane to the passing lane on a four-lane highway. Regarding the other claimed infraction, characterized as taillights cutting on and off, the testimony of the State was in direct conflict as to which truck had the malfunctioning equipment. (See Appendices L, M, and N for the relevant testimony.) Further, the tapes of all radio conversations immediately preceding the stops were mysteriously blank.

The traffic codes of virtually every jurisdiction are replete with statutory terms of a vague and ambiguous nature which essentially give police officers an unbounded power of investigatory detention.[2] Where these provisions are enforced by traffic officers on routine patrol, the issue of the pretextural use of claimed traffic infractions to circumvent the Fourth Amendment does not arise. However, where a claimed traffic infraction is used to justify a vehicular stop by officers with a

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[2] *See, e.g.*, Chapter 316 of the Florida Statutes (1981), "The State Uniform Traffic Control Act": §316.084(2)—passing on the right permitted "only under conditions permitting such movement in safety"; §316.0895—unlawful to "follow another vehicle more closely than is reasonable and prudent"; §316.151—"the approach for a right turn and a right turn shall be made as close as practicable to the right hand curb or edge of the road way"; §316.1515—U-turns prohibited "unless such movement can be made in safety and without interfering with other traffic." These are just a few of the many infractions which are cast in essentially open-ended terms of judgment and degree.

clear ulterior investigatory motive, a serious question arises which threatens the very heart of the principles announced by this Court in *United States v. Cortez, supra,* and the decisions discussed therein.

United States v. Cruz, 581 F.2d 535, 541-42 (5th Cir. 1978), is the most relevant decision to the case at bar. A deputy sheriff stopped a car because it made an illegal U-turn. Subsequent investigation revealed illegal immigrants in the car. The court held that all evidence discovered subsequent to the stop should have been suppressed:

> Our appraisal of the facts, viewed in the light most favorable to the prosecution, leads us to the conclusion that Deputy Muldraw stopped the Pontiac for the sole purpose of searching for aliens. It is not suggested that he had any cause to conduct such a search, let alone cause that was probable. However credible the officer may have appeared to be when he testified, our experience as human beings, as lawyers, and judges, prevents our being gullible enough to think that an untrained, part-time deputy sheriff, while only technically on duty because he was en route to get a radio installed in his own pick-up truck, went out of his way to turn around, follow a motorist for a mile, and then stop him merely to proffer the advice, "You must have made a U-turn a mile or so back there, and I want to warn you that you must not do it again." We are left with the firm conviction that Deputy Muldraw was hunting for illegal aliens and stopped Rhode's automobile in order to inspect its occupants.

Other decisions in the lower federal courts also illustrate the problem. Most recently, in *United States v. Shaeffer,* 637 F.2d 200 (3d Cir. 1980), the court ruled that evidence should be suppressed since "the courts will not countenance pretextural use of a regulatory statute

for an investigatory purpose unrelated to the regulatory scheme. *Id.* at 204. In *United States v. Keller,* 499 F. Supp. 415 (N.D. Ill. 1980), the court suppressed evidence "since the technical traffic violation stop of Keller was purely pretextural . . . ." Evidence was suppressed on the same basis in *Amador-Gonzalez v. United States,* 391 F.2d 308 (5th Cir. 1968), and *Taglavore v. United States,* 291 F.2d 262 (9th Cir. 1961).

Decisions in Florida have recognized, consistent with *United States v. Cruz, supra,* that evidence seized after a pretextural traffic stop is inadmissible. In *Graham v. State,* 60 So. 2d 186 (Fla. 1952), the court suppressed evidence seized after a deputy sheriff stopped the defendants because "he saw appellant drive across the center line of the road between Ft. Meade and Bartow two or three times as he followed her down the road." *Id.* at 187. The court stated, "there is no escaping the conclusion that [the deputy] was waiting beside the road for this particular appellant to come by and he used reckless driving as an excuse and not for a lawful cause for stopping defendant and placing her under arrest." *Id.* Similarly, in *Harding v. State,* 301 So. 2d 513 (Fla. 2d DCA 1974), the court suppressed evidence because it was seized incident to a pretextural arrest on outstanding traffic warrants.

The difficult issue which this Court should address is what criteria should be applied to determine whether a particular traffic stop is in fact "pretextural." If this Court fails to do so there is a grave potential that the Fourth Amendment principles announced in *United States v. Cortez* will be undermined. Although it seems clear that an offender who is suspected of criminal activity should not have immunity from enforcement of the traffic laws, the traffic laws should not be cyni-

cally manipulated to evade the protections of the Fourth Amendment. The desirable standard should focus on whether the State has introduced objective evidence sufficient to show that given the seriousness of the traffic infraction a stop would have been made by a traffic officer on routine patrol. If such were true, the fact that the stopping officer had an ulterior investigatory motive would not defeat the legality of the detention.

In the case at bar, petitioners argued in the Florida First District Court of Appeal that based upon the investigatory motive and the objective facts surrounding the traffic stop (*i.e.*, the relatively innocuous and ambiguous nature of claimed infractions, the conflict in the state's testimony, the stop of the trucks at exactly the same point, the mysterious failure of the dual taping system, and the fact that no traffic citations were ever issued) the state did not satisfy the above standard. The same argument was raised in the trial court. (See Appendix R.) Nonetheless, it appears that the incantation of traffic infraction language by the investigating officers was sufficient to justify the stop since neither the trial nor appellate court saw fit to even discuss the issue. This demonstrates the need for this Court to articulate the appropriate Fourth Amendment standards.

Although the two deputies who made the stops at issue never justified their actions upon the "founded suspicion" standard, the State argued on appeal and may argue here that the anonymous phone tip justified the stop of the trucks. The only detail supplied in the anonymous tip was that two trucks were driving with their headlights out. This detail was not corroborated by the arresting officers. The case law of both Florida and many other jurisdictions is clear that such a vague, uncorroborated, anonymous tip is not sufficient to meet

Fourth Amendment standards for the stop of a vehicle. Rather, an anonymous tip alleging criminal activity (which the tip in the case at bar did not) must be detailed in nature and corroborated by independent police observation before a "founded suspicion" can be said to exist. *See, e.g., United States v. McLeroy,* 584 F.2d 746 (5th Cir. 1978); *United States v. DeVita,* 526 F.2d 81 (9th Cir. 1975); *Henighan v. United States,* 433 A.2d 1059 (D.C. Cir. 1981); *State v. Hetland,* 366 So. 2d 831 (Fla. 4th Dist. Ct. App. 1979), opinion adopted by the Florida Supreme Court, 387 So. 2d 963 (Fla. 1980); *State v. Blanton,* 400 So. 2d 661 (La. 1981); *State v. Hasenbank,* 425 A.2d 1330 (Me. 1981); *People v. DeBour,* 352 N.E.2d 562 (N.Y. 1976); *Commonwealth v. Anderson,* 392 A.2d 1298 (Pa. 1978); *State v. Sieler,* 621 P.2d 1272 (Wash. 1980); *State v. Lesnick,* 530 P.2d 243 (Wash. 1975). There is substantial doubt about the constitutionality of even this standard. *See White v. United States,* ___ U.S. ___, 102 S. Ct. 424 (1981) (Justice White, joined by Justices Brennan and Marshall, dissenting from the denial of certiorari.)

But this discussion is not relevant since the record is clear that the deputy sheriffs justified their stop of the trucks on alleged traffic infractions and not on the anonymous tip. As discussed above, if this Court intends for the "founded suspicion" standard governing vehicle stops to be a meaningful protection of Fourth Amendment values, then the Court should address the important federal question of the Fourth Amendment criteria to be applied to pretextural traffic stops.

II.

The decision of the Florida First District Court of Appeals summarily upholding the constitutionality of the Florida Drug Trafficking Law over Fifth Amendment self-incrimination and due process objections is in conflict with applicable decisions of this Court and raises importat questions of federal law which should be settled by this Court.

A number of recent appeals and petitions for certiorari have urged this Court to rule upon the constitutionality of the Florida Drug Trafficking Law.[3] As the considerable body of appellate papers in these cases demonstrate, serious constitutional questions have been created by the Law.

The full text of the Florida Drug Trafficking Law is reprinted in Appendix O. Under subsection (3), a convicted defendant must receive a specified mandatory sentence without possibility of parole. The defendant may avoid such sentence *only* by providing "substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals." If, in the complete and unreviewable discretion of the prosecution, such "substantial assistance"

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[3] *Blalock v. Florida*, Case No. 81-712; *Cowgill v. Florida*, Case No. 81-743; *Wall v. Florida*, Case No. 81-782 (appeals dismissed for want of jurisdiction, January 11, 1982). *Alander v. Florida*, Case No. 81-423; *Clarke v. Florida*, Case No. 81-834; *Leight v. Florida*, Case No. 81-836 (certiorari denied). *Locke v. Florida*, Case No. 81-960 (appeal dismissed for want of a substantial federal question, March 1, 1982). *Ragno v. Florida*, Case No. 81-1310; *Smith v. Florida*, Case No. 81-1351; *Bilford v. Florida*, Case No. 81-1621 (appeals pending).

has been rendered, the mandatory sentence may be reduced or completely suspended. The law provides no immunity for any disclosures made in an effort to obtain the good offices of the prosecution, and such disclosures could clearly be the basis for further state or federal prosecution. On the face of it, therefore, the law imposes long sentences as a coercive device to compel disclosures without immunity, and further places the complete discretionary power to initiate sentence reduction in the prerogative of the prosecutor.

In *State v. Benitez*, 395 So. 2d 514 (Fla. 1981) (set forth in Appendix P), the Florida Supreme Court held that this sentencing scheme did not violate the privilege against self-incrimination. The court reasoned that "nothing in the statute is compulsive," *id.*, at 519, and that a sentence reduction obtained by a sentenced defendant "is not tantamount to the enhancement of a sentence imposed on an unsentenced, but convicted defendant as a result of his lack of cooperation." *Id.* at 520. The court also found no infirmity in investing the prosecutor with complete sentencing discretion since the process was a "*post-conviction* form of plea bargaining" which could "tolerate subjectivity to an extent which normally would be impermissible for penal statutes," *id.* at 518. The court reaffirmed this "post-conviction plea bargaining" concept in *State v. Werner*, 402 So. 2d 386 (Fla. 1981) (set forth in Appendix Q).

Surely, a statutory scheme which creates such severely coercive prosecutorial powers in an effort to compel possibly incriminating disclosures raises grave constitutional questions. Further, this coercive device has been adopted by a number of other jurisdictions in virtually

identical or similar form.[4] Only one decision outside of Florida has been discovered which discusses the constitutionality of such a statute, and no self-incrimination argument was raised or discussed therein.[5]

(a) The Privilege Against Self-Incrimination

In *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981), this Court unequivocally held that the privilege against self-incrimination applies at the

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[4] Code of Alabama, § 20-2-81, enacted in 1980 [identical to Fla. Stat. § 893.135(3)]; Louisiana Revised Statutes, § 40:967(G)(2), enacted in 1979 [virtually identical to Fla. Stat. § 893.135(3), but no provision for in camera hearing]. New York Penal Law § 65.00(1)(b) is a similar coercive provision built into the general sentencing structure: "The court . . . may sentence a person to a period of probation upon conviction of a class A-III felony if the prosecutor . . . recommends the . . . sentence . . . upon the grounds that such person has or is providing material assistance." These provisions should be compared with two other recent enactments: Ohio Revised Code Annotated, § 3719.70(B) effective July 1, 1976: "When a person is convicted of any drug abuse offense, the court shall, in determining whether to suspend sentence or place the person on probation, take into consideration whether such person has truthfully revealed all information within his knowledge . . . such information shall include . . . the identity and whereabouts of accomplices, accessories, aiders, and abettors . . ."; General Statutes of North Carolina, § 90-95(h)(5) effective March 1, 1981: "The sentencing judge may . . . impose less than the applicable minimum prison term . . . when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest or conviction of . . . co-conspirators . . . if the sentencing judge enters in the record a finding that the person sentenced has rendered such substantial assistance."

[5] *People v. Eason*, 40 N.Y.2d 297, 386 N.Y.S.2d 673, 353 N.E.2d 587 (1976). The long mandatory prison terms provided in the New York law were held not to violate the cruel and unusual punishment clause in *Carmona v. Ward*, 576 F.2d 405 (2d Cir. 1978).

sentencing stage. In *Roberts v. United States*, 445 U.S. 552, 100 S. Ct. 1358, 63 L. Ed. 2d 622 (1980), this Court held that under generally accepted principles of sentencing it was not improper for a court to consider the defendant's lack of cooperation as bearing on his need for rehabilitation. In that case, the petitioner had claimed for the first time on appeal that judicial consideration of his lack of cooperation violated the privilege against self-incrimination. The Court responded that "these arguments would have merited serious consideration if they had been presented properly to the sentencing judge." 445 U.S. at 559. This recognition was based upon a considerable body of law in the federal courts of appeal that a sentencing penalty for lack of cooperation would violate the privilege against self-incrimination.[6] These federal decisions clearly indicate that serious self-incrimination issues arise when a failure

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[6] In *United States v. Garcia*, 544 F.2d 681, 684-86 (3d Cir. 1976), the court squarely held that requiring defendants to cooperate in the identification and prosecution of accomplices violated the privilege. The Fifth Circuit has reached the same conclusion in a number of decisions. *United States v. Wright*, 533 F.2d 214, 215-17 (5th Cir. 1976); *United States v. Rogers*, 504 F.2d 1079, 1084-85 (5th Cir. 1974); *United States v. Acosta*, 501 F.2d 1330, 1337-38 (5th Cir. 1974); *dissenting opinion of Judge Gee, adopted en banc*, 509 F.2d 539 (5th Cir. 1975).

The First and Second Circuits have held that the sentencing judge may state that he has taken into consideration the defendant's non-cooperation so long as the judge gives consideration to all factors bearing on the need for rehabilitation and does not *punish* the accused for remaining silent. *United States v. Bradford*, 645 F.2d 115 (2d Cir. 1981); *United States v. Barnes*, 604 F.2d 121 (2d Cir. 1979); *United States v. Miller*, 589 F.2d 1117 (1st Cir. 1978). A contrary result was reached, however, where non-cooperation was the sole basis for enhanced punishment, *United States v. Ramos*, 572 F.2d 360 (2d Cir. 1978). Hence, the Florida Supreme Court's decision is also directly in conflict with this line of authority.

of cooperation is considered as *one factor* in the complex of sentencing variables bearing upon the need for rehabilitation. Under the Florida Drug Trafficking Law the failure to cooperate is the *only factor* affecting sentencing severity. The Drug Trafficking Law therefore poses the constitutional issue in stark relief.

If it is conceded that the privilege against self-incrimination applies to the sentencing structure in the Drug Trafficking Law, it remains to consider whether the law is sufficiently compulsive and whether the required disclosures involve a sufficient risk of incrimination to invoke the privilege. The decisions of this Court are clear on both points.

The compulsion of the Drug Trafficking Law is the imposition of mandatory sentences without parole of up to twenty-five years in prison. If "substantial assistance" is rendered, such sentence may be reduced or totally suspended. These sentencing differentials are obviously compelling, and this Court has held that penalties of an economic nature, significantly less coercive than incarcerative sentences, were sufficient to trigger the privilege. *Lefkowitz v. Cunningham,* 431 U.S. 801, 97 S. Ct. 2132, 53 L. Ed. 2d 1 (1977), and decisions cited therein.

It is equally clear that the disclosures compelled by the Drug Trafficking Law involve a sufficient risk of incrimination to invoke the privilege. The statute, for instance, requires the accused to identify accomplices and co-conspirators. This type of disclosure was held protected by the privilege in *Malloy v. Hogan,* 378 U.S. 1, 12-14, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964), since the identified accomplice might have information incriminating the defendant in other crimes. Were this not sufficient, it is also clear that disclosures made to

state officials without immunity could be the basis for federal prosecution, not only for drug violations under Title 21 of the United States Code, but also for related crimes such as the federal RICO offense. 18 U.S.C. §§ 1961-68. *Abbate v. United States,* 359 U.S. 187, 79 S. Ct. 666, 3 L. Ed. 2d 729 (1959). The possibility of incrimination under the laws of a separate sovereign is within the protection of the privilege. *Marchetti v. United States,* 390 U.S. 39, 44-48, 88 S. Ct. 697, 19 L. Ed. 2d 889 (1968)

(b) Due Process

The due process issues raised by the Florida Drug Trafficking Law are equally grave. The Florida Supreme Court did not question the contention that the "substantial assistance" standard and the lack of judical review gave unbounded discretion to the prosecution. *State v. Benitez,* 395 So. 2d at 514-15. Rather, the court approved such discretion on the theory that the statute created a "*post-conviction* form of plea bargaining." *Id.* at 518. *Accord: State v. Werner,* 402 So. 2d 386 (Fla. 1981). At the outset, therefore, there arises the critical issue of whether the prosecutor's complete discretionary power over a sentencing outcome can be conceptually separated from the sentencing process by analogizing it to "plea bargaining." This Court has consistently emphasized that it is the *nature of the interest involved* which determines the procedures and standards constitutionally required, and not the label supplied by the State. Thus, if in fact the prosecutor's discretionary decision regarding the defendant's "substantial assistance" is part of sentencing, which it would seem to be, then the defendant is entitled to the "full panoply of rights due a defendant." *Morrissey v. Brewer,*

408 U.S. 471, 480, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), citing *Mempha v. Rhay*, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967). But even if the prosecutor's power to affect the sentence is not viewed as part of the sentencing process, it is still nevertheless clear that the defendant has a sufficient "liberty interest" in the outcome to be entitled to at least the procedural rights of a hearing before a neutral decision maker and an opportunity to be heard. *Morrissey v. Brewer, supra* (parole violation decision); *Vitek v. Jones*, 445 U.S. 480, 100 S. Ct. 1254, 16 L. Ed. 2d 552 (1980) (involuntary transfer of a prisoner to a mental hospital); *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974) (forfeiture of "good time" for serious misbehavior); *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973) (probation revocation decision); *Specht v. Patterson*, 386 U.S. 605, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967) (categorization as a habitual sex offender).

It was the purpose of the Florida Legislature to create severely coercive sentencing powers and place them in the hands of the prosecutor so that disclosures could be compelled. The due process issue presented is whether such powers may be exercised at the whim of the state officer charged with *prosecuting* the crime. Clearly, if the power were the issuance of an arrest warrant, *Shadwick v. City of Tampa*, 407 U.S. 345, 92 S. Ct. 2119, 32 L. Ed. 2d 783 (1972), the issuance of a search warrant, *Coolidge v. New Hampshire*, 403 U.S. 433, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), or detention of an accused prior to trial, *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975), such prosecutorial power would be unconstitutional. The prosecutorial power created by the Florida Drug Trafficking Law

presents at least an equal threat to individual liberty and freedom from prosecutorial overbearing. Consequently, serious due process issues are presented which should be decided by this Court.

CONCLUSION

Based on the foregoing arguments, there are special and important reasons for reviewing the constitutional issues presented in this Petition. Petitioners therefore respectfully move the Court to grant the Petition for Writ of Certiorari and to require briefs on the merits and oral argument in this cause.

Respectfully submitted,

JOHN F. YETTER

Post Office Box 10529
Tallahassee, Florida 32302
(904) 224-9037

Counsel of Record

AND

ROBERT P. FOLEY

406 North Dixie
West Palm Beach, Florida 33401
(305) 832-1744

E. THOMAS MAXWELL, JR.

604 Keyser Building
Baltimore, Maryland 21202
(301) 752-6566

Counsel for Petitioner

Appendix

APPENDIX A

INFORMATION

IN THE CIRCUIT COURT OF THE
THIRD JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR TAYLOR COUNTY, FLORIDA

No. 80-237 CF

STATE OF FLORIDA

v.

JORGE LUIS NEIRA, SERGIO MODESTO RODRIGUEZ, THOMAS FANNON, ANICETO JULIO CORDERO, WILLIAM JEFFREY EDWARDS,

Defendant(s).

INFORMATION FOR:
Trafficking In More Than 10,000 Pounds of Cannabis

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

JERRY M. BLAIR, State Attorney of the Third Judicial Circuit of Florida, charges that **Jorge Luis Neira, Sergio Modesto Rodriguez, Thomas Fannon, Aniceto Julio Cordero,** and **William Jeffrey Edwards** on the 18th day of November, 1980, in Taylor County, Florida, did knowingly and unlawfully deliver or bring into this State, or were knowingly and unlawfully in actual or constructive possession of in excess of One Hundred (100) Pounds of **Cannabis**, to-wit: More than Ten Thousand

(10,000) Pounds of Cannabis, contrary to Florida Statute 893.135 and 777.011.

WHEREFORE, JERRY M. BLAIR prays that a capias issue for the arrest of the above defendant(s) and that they be held for trial under the foregoing Information.

Jerry M. Blair
State Attorney, Third Judicial Circuit

By /s/ Daniel A. McKeever
Designated Assistant

STATE OF FLORIDA
COUNTY OF TAYLOR

PERSONALLY APPEARED BEFORE ME DANIEL A. MCKEEVER, Designated Assistant State Attorney of the Third Judicial Circuit, who being first duly sworn, says that the allegations set forth in the foregoing Information are based upon facts that have been sworn to as true and which if true would constitute the offense therein charged. Affiant further certifies that this prosecution is instituted in good faith and that he has received testimony under oath from the material witness or witnesses for the offense(s) charged.

/s/ Daniel A. McKeever
Designated Assistant State Attorney

Sworn to and subscribed before me this 23rd day of March, 1981.

/s/ Luan F. Slaughter
Notary Public
State of Florida at Large
My commission expires Jan. 10, 1983

Presented and filed in Court
this 23rd day of March, 1981.

/s/ Charles R. Carlton
Clerk of the Circuit Court

APPENDIX B

MOTION TO DISMISS THE INFORMATION

IN THE CIRCUIT COURT OF THE
THIRD JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR TAYLOR COUNTY, FLORIDA
Criminal Division

No. 80-237 CF

STATE OF FLORIDA,
Plaintiff,

v.

THOMAS FANNON,
Defendant.

MOTION TO DISMISS*

COMES NOW the Defendant, **Thomas Fannon**, by and through his undersigned attorney, pursuant to F.R.Cr.P. 3.190, and moves this Court to dismiss the charges in the present case. As grounds therefore the Defendant would show unto the Court as follows:

1. The Defendant is charged in the present case with "Trafficking in Cannabis (+10,000 lbs.)" in that he allegedly did attempt to possess cannabis in excess of One Hundred Pounds, pursuant to F.S. 893.135.

2. F.S. 893.135 provides:

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* An identical motion was filed the same day by Petitioner Edwards.

a. (1) sets forth mandatory minimum sentences for possession of cannabis in excess of specified quantities.

b. (2) prohibits the trial judge from suspending, deferring or withholding adjudication of guilt or imposition of sentence.

c. (3) permits the state attorney to move the Court to reduce or suspend the mandatory minimum sentences provided in (1) where the Defendant ". . . provides substantial assistance in the identification, arrest and conviction of any of his accomplices, accessories, co-conspirators or principals."

3. (3) of F.S. 893.135 is facially unconstitutional for the following reasons:

a. (3) of F.S. 893.135 is in violation of Article I, § 9 of the Florida Constitution and the Fifth Amendment to the United States Constitution in that it compels the Defendant to forfeit his privilege against self-incrimination in order to obtain the benefits of the Statute. It should be noted that the Statute contains no provision for use or transactional immunity and in no way limits the prosecuting attorney from using statements from the Defendant in a subsequent prosecution.

b. (3) of F.S. 893.135 is in violation of Article IV, § 4 of the Florida Constitution in that it grants to the state attorney, rather than the sentencing judge, the authority to determine which Defendant will be eligible for a reduced or suspended sentence.

c. (3) of F.S. 893.135 is in violation of the Due Process clause of the Fourteenth Amendment in that the Statute vests broad discretion in the prosecuting attorney without providing objective standards for the exercise of this discretion.

d. (3) of F.S. 893.135 is in violation of the Due Process clause of the Fourteenth Amendment in that the Statute provides no mechanism for the judicial review of the state attorney's decision *not* to move the court for a reduction or suspension of the sentencing provisions of (1).

e. (3) of F.S. 893.135 is in violation of the Due Process clause and Equal Protection clause of the Fourteenth Amendment in that it provides no mechanism by which the Defendant may produce evidence before the court as to the Defendant's "substantial assistance" and thereby receive the benefits provided in (3).

f. (3) of F.S. 893.135 is in violation of the Due Process clause of the Fourteenth Amendment in that it is vague and indefinite. Specifically, the Statute permits a reduction or suspension of the sentence of a Defendant who provides "substantial assistance" without any indication as to the meaning of definition of "substantial".

g. (3) of F.S. 893.135 is in violation of the Equal Protection clause of the Fourteenth Amendment in that it denies the benefits of this section to an individual, however, who acted alone or who lacks any knowledge as to the existence of "accomplices, accessories, co-conspirators or principals".

WHEREFORE, the Defendant respectfully requests this Court to dismiss the charges in the present case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail this 10th day of March, 1981, to the following:

Daniel A. McKeever, Jr., Esq.
Special Prosecutor
P. O. Drawer 1546
Live Oak, FL 32060

E. Thomas Maxwell, Esq.
Ste. 604, Kayser Bldg.
Baltimore, MD 21202

Thomas F. Woods, Esq.
1030 E. Lafayette
Suite 604
Tallahassee, FL 32301

Paul A. Lehrman, Esq.
103 North Gadsden Street
Tallahassee, FL 32301

Respectfully submitted,

/s/ Robert P. Foley
Foley and Colton, P.A.
406 North Dixie Highway
West Palm Beach, Florida 33401
(305) 832-1744

Attorneys for Defendant Fannon

APPENDIX C

ORDER DENYING MOTIONS TO DISMISS

IN THE CIRCUIT COURT OF THE
THIRD JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR TAYLOR COUNTY, FLORIDA
Criminal Division

No. 80-237 CF

STATE OF FLORIDA,
Plaintiff,

v.

WILLIAM JEFFREY EDWARDS,
THOMAS FANNON, *ET AL.*,
Defendants.

ORDER

THIS MATTER coming on to the Court on Defendants' William Jeffrey Edwards and Thomas Fannon's Motion to Dismiss dated March 12, 1981, and upon consideration of same, it is,

ORDERED AND ADJUDGED that said Motion to Dismiss is hereby denied. *See: Benitez v. State*, 395 So. 2d 514, Fla. Sup. Ct. 1981.

DATED this 4th day of June, 1981.

/s/ John W. Peach
Circuit Judge

Copies furnished:

Daniel A. McKeever, Jr., Esquire
Special Prosecutor
E. Thomas Maxwell, Esquire
Attorney for Defendant Edwards
Robert P. Foley, Esquire
Attorney for Defendant Fannon
Henry B. Rothblatt, Esquire

APPENDIX D

MOTION TO SUPPRESS EVIDENCE

IN THE CIRCUIT COURT OF THE
THIRD JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR TAYLOR COUNTY, FLORIDA
Criminal Division

No. 80-237 CF

STATE OF FLORIDA,
Plaintiff,

v.

THOMAS FANNON,
Defendant.

MOTION TO SUPPRESS*

COMES NOW the Defendant, Thomas Fannon, by and through his undersigned attorney, pursuant to Article 1, § 12 of the Florida Constitution and Fla. R. Cr. P. 3.190(h), and moves this Court to enter its Order suppressing the evidence in the above-styled cause. The specific evidence to be suppressed is a quantity of marijuana seized from the Defendant's truck on November 18, 1980. As ground therefore the Defendant would show unto the Court as follows:

1. On November 18, 1980, at approximately 4:30 A.M., a Taylor County, Florida Dispatcher received infor-

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* An identical motion was filed the same day by Petitioner Edwards.

mation that two trucks were seen leaving a remote beach area with their lights out. Shortly thereafter, the Dispatcher notified Deputy Sheriff David Culpaper and Deputy Sheriff Bob Holly of this information. As the Defendant **Fannon** drove his tan truck to the intersection of U.S. 19 and Beach Road in Taylor County, Florida, Deputy Sheriff Culpepper spotted the vehicle. Deputy Sheriff Culpepper was in an unmarked police car without a blue light. Deputy Sheriff Culpepper followed Defendant **Fannon** north on U.S. 19 until Defendant **Fannon** arrived within the city limits in the area where Deputy Sheriff Holly had previously stopped another truck driven by Co-Defendant **Edwards**. Deputy Sheriff Culpepper then told Perry Police Officer Bobby Alberson to stop the Defendant **Fannon's** truck, which he did by turning on his blue lights and directing the truck to stop approximately 150 feet north of the Defendant **Edwards'** truck, in front of the Holiday Inn in Perry, Florida. Defendant **Fannon** was then arrested and placed in custody by Deputy Sheriff Culpapper when he was unable to produce a valid driver's license. Deputy Sheriff Culpepper then asked Defendant **Fannon** for permission to search inside the truck body. **Fannon** did not give his permission to search. Deputy Sheriff Culpepper told **Fannon** he could obtain a warrant if such permission was not given. Deputy Sheriff Culpapper then opened the truck and searched the interior. On the basis of the evidence seized from the truck charges were filed in the above-styled cause.

2. The initial stop of the vehicle and the arrest of the Defendant **Fannon** was unlawful where Deputy Sheriff Culpepper and Perry Police Officer Bobby Alberson did not have sufficient information to establish probable cause to arrest the Defendant. *Beck v. Ohio,* 379 U.S. 89, 85 S. Ct. 223 (1964); *D'Agostino v. State,* 310

So. 2d 12 (Fla. 1975); *Porchay v. State,* 321 So. 2d 439 (Fla. App. 1975); *United States v. Brignoni-Ponce,* 442 U.S. 873, 95 S. Ct. 2574 (1975). Where the seizure of the vehicle and subsequent search occurred in the immediate aftermath and as the direct result of the initial unlawful arrest of the Defendant, the seizure of marijuana should be suppressed as "fruit of the poisonous tree". *Bailey v. State,* 319 So. 2d 22 (Fla. 1975); *Beck v. Ohio, supra*; *D'Agostino v. State, supra.*

WHEREFORE, the Defendant respectfully moves this Court to enter its Order suppressing the evidence in the instant case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail this 19th day of March, 1981, to **Daniel A. McKeever, Jr., Esquire,** Special Prosecutor, Post Office Drawer 1546, Live Oak, Florida 32060; **Thomas F. Woods, Esquire,** 1030 East Lafayette, Suite 604, Tallahassee, Florida 32301; **Paul A. Lahrman, Esquire,** 103 North Gadsden Street, Tallahassee, Florida 32301; and to **E. Thomas Maxwell, Esquire,** Suite 604, Kayser Building, Baltimore, Maryland 21202.

Respectfully submitted,

/s/ Robert P. Foley
Foley and Colton, P.A.
406 North Dixie Highway
West Palm Beach, FL 33401
(305) 832-1744

Attorneys for Defendant Fannon

APPENDIX E

ORDER DENYING MOTIONS TO SUPPRESS EVIDENCE

IN THE CIRCUIT COURT OF THE
THIRD JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR TAYLOR COUNTY, FLORIDA
Criminal Division

No. 80-237 CF

STATE OF FLORIDA,
Plaintiff,

v.

WILLIAM JEFFREY EDWARDS
and
THOMAS FANNON, *ET AL.*,
Defendants.

ORDER

THIS MATTER coming before the Court on Defendants' William Edwards' and Thomas Fannon's Motion to Suppress dated March 19, 1981, and upon consideration of same, it is,

ORDERED AND ADJUDGED that Defendants' Motion to Suppress is hereby Denied. The Court finds the arresting officers had probable cause to search the trucks and there were exigent circumstances so that a search warrant was not necessary.

DONE AND ORDERED this 4th day of June, 1981, in Chambers, at the Taylor County Courthouse, Perry, Florida.

/s/ John W. Peach
Circuit Judge

Copies furnished:

Daniel A. McKeever, Jr., Esquire
Special Prosecutor

E. Thomas Maxwell, Esquire
Attorney for Defendant Edwards

Robert P. Foley, Esquire
Attorney for Defendant Fannon

Henry B. Rothblatt, Esquire

APPENDIX F

AMENDED JUDGMENT AND SENTENCE FOR PETITIONER FANNON

IN THE CIRCUIT COURT OF THE
THIRD JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR TAYLOR COUNTY, FLORIDA
Spring Term, 1981

No. 80-237 CF

STATE OF FLORIDA,

v.

THOMAS FANNON,
Defendant.

AMENDED JUDGMENT AND SENTENCE

The defendant **Thomas Fannon** being personally before the Court, represented by Robert P. Foley, his attorney of record, having entered a plea of nolo contendere to the crime of Trafficking in Cannabis +2,000 lbs. and the Court having inquired and given the Defendant an opportunity to be heard and show cause why he should not be adjudged guilty and sentenced as provided by law, including an opportunity to offer matters in mitigation of sentence, and no cause being shown, it is thereupon:

Ordered that the Defendant **Thomas Fannon** is hereby adjudicated guilty of the crime of Trafficking in Cannabis +2,000 lbs. It is the sentence of the law that said Defendant be committed to the custody of the Depart-

ment of Offencer Rehabilitation of the State of Florida, to be imprisoned at hard labor for the term of Fifteen (15) Years, with a minimum mandatory sentence of Five (5) Years, and pay a Fine of $50,000.00 + 5% + $10.00 Crimes Compensation Fund* in the institution in the State Correctional System to which said Department may cause you to be confined. (The Court recommends that you be confined at – – – – – – – – – – type institution.)

It is further ordered that you shall be allowed 30 days credit for such time as you have been incarcerated prior to the imposition of this sentence for this offense. (No credit should be allowed if the Defendant is already under sentence or if credit has been previously given for another offense. Strike if not applicable.)

It is further ordered that this sentence is ~~(concurrent)~~ ~~(consecutive)~~ with the sentence imposed for the crime of (Strike if not applicable), Taylor County Case No. – – – –.

It is further ordered that the Sheriff of Taylor County, Florida, is hereby ordered and directed to deliver said Defendant to the Department of Offender Rehabilitation together with a copy of this Judgment and Sentence. It is further ordered and adjudged that said Defendant shall pay the sum of One Dollar ($1.00) pursuant to Section 943.24, Florida Statutes.

The Defendant in Open Court was advised of his right to appeal from this Judgment and Sentence within thirty days from this date, and the Defendant's entitlement to the assistance of counsel in taking said appeal upon a showing that said Defendant was entitled to an attorney at the expense of the State.

The following are the fingerprints of the above named Defendant, **Thomas Fannon:**

[Fingerprint Chart Deleted]

DONE AND ORDERED in open Court at Taylor County, Florida, this 29th day of June, A.D. 1981.

I HEREBY CERTIFY that the above and foregoing fingerprints on this Judgment and Sentence are the fingerprints of the Defendant, **Thomas Fannon**, and that they were placed thereon by said Defendant in my presence in open Court this date.

/s/ [Signature]
Judge

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* + $1.00

APPENDIX G

AMENDED JUDGMENT AND SENTENCE FOR PETITIONER EDWARDS

IN THE CIRCUIT COURT OF THE
THIRD JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR TAYLOR COUNTY, FLORIDA
Spring Term, 1981

No. 80-237 CF

STATE OF FLORIDA,

v.

WILLIAM JEFFREY EDWARDS,
Defendant.

AMENDED JUDGMENT AND SENTENCE

The defendant **William Jeffrey Edwards** being personally before the Court, represented by Hon. E. T. Maxwell, his attorney of record, having entered a plea of nolo contendere to the crime of Trafficking in Cannabis +2,000 lbs. and the Court having inquired and given the Defendant an opportunity to be heard and show cause why he should not be adjudged guilty and sentenced as provided by law, including an opportunity to offer matters in mitigation of sentence, and no cause being shown, it is thereupon:

Ordered that the Defendant **William Jeffrey Edwards** is hereby adjudicated guilty of the crime of Trafficking in Cannabis +2,000 lbs. It is the sentence of the law

that said Defendant be committed to the custody of the Department of Offencer Rehabilitation of the State of Florida, to be imprisoned at hard labor for the term of Fifteen (15) Years, with a minimum mandatory sentence of Five (5) Years, and pay a Fine of $50,000.00 + 5% + $10.00 Crimes Compensation Fund* in the institution in the State Correctional System to which said Department may cause you to be confined. (The Court recommends that you be confined at – – – – – – – – – – type institution.)

It is further ordered that you shall be allowed 30 days credit for such time as you have been incarcerated prior to the imposition of this sentence for this offense. (No credit should be allowed if the Defendant is already under sentence or if credit has been previously given for another offense. Strike if not applicable.)

It is further ordered that this sentence is ~~(concurrent)~~ ~~(consecutive)~~ with the sentence imposed for the crime of (Strike if not applicable), Taylor County Case No. – – –.

It is further ordered that the Sheriff of Taylor County, Florida, is hereby ordered and directed to deliver said Defendant to the Department of Offender Rehabilitation together with a copy of this Judgment and Sentence. It is further ordered and adjudged that said Defendant shall pay the sum of One Dollar ($1.00) pursuant to Section 943.24, Florida Statutes.

The Defendant in Open Court was advised of his right to appeal from this Judgment and Sentence within thirty days from this date, and the Defendant's entitlement to the assistance of counsel in taking said appeal upon a showing that said Defendant was entitled to an attorney at the expense of the State.

The following are the fingerprints of the above named Defendant, **William Jeffrey Edwards**:

[Fingerprint Chart Deleted]

DONE AND ORDERED in open Court at Taylor County, Florida, this 29th day of June, A.D. 1981.

I HEREBY CERTIFY that the above and foregoing fingerprints on this Judgment and Sentence are the fingerprints of the Defendant, **William Jeffrey Edwards**, and that they were placed thereon by said Defendant in my presence in open Court this date.

/s/ [Signature]
Judge

---

* + $1.00

APPENDIX H

NOTICE OF APPEAL

IN THE CIRCUIT COURT OF THE
THIRD JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR TAYLOR COUNTY, FLORIDA
Criminal Division

No. 80-237 CF

STATE OF FLORIDA,
Plaintiff,

v.

THOMAS FANNON
and
WILLIAM EDWARDS,
Defendants.

NOTICE OF APPEAL

COME NOW, the Defendants, **Thomas Fannon** and **William Edwards**, by and through their undersigned attorneys, and appeal to the First District Court of Appeal the Judgement and Sentence of this Court rendered this 29th day of June, 1981.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by hand delivery this 29th day of June, 1981, to the Office of the State Attorney, Taylor County Courthouse, Perry, Florida.

Respectfully submitted,

/s/ Robert P. Foley
Foley and Colton, P.A.
406 North Dixie Highway
West Palm Beach, FL 33401
(305) 832-1744
Attorneys for Defendant Fannon

and

/s/ E. Thomas Maxwell
604 Keyser Building
Baltimore, MD 21202
Attorney for Defendant Edwards

APPENDIX I

DECISION OF THE FIRST DISTRICT COURT OF APPEAL, STATE OF FLORIDA, AFFIRMING THE CONVICTIONS OF PETITIONERS

(Not Final Until Time Expires To File Rehearing Petition And Disposition Thereof, If Filed.)

IN THE
DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

No. AE-346

THOMAS FANNON
and
WILLIAM JEFFREY EDWARDS,
Appellants,

v.

STATE OF FLORIDA,
Appellee.

Opinion filed January 27, 1982.

An appeal from the Circuit Court for Taylor County, John W. Peach, Judge.

John F. Yetter, Tallahassee, and Robert Foley, West Palm Beach, Attorneys for Appellants.

Jim Smith, Attorney General; Carolyn M. Snurkowski, Assistant Attorney General; and Dan R. Stengle, Legal Intern; Tallahassee, Attorneys for Appellee.

Per curiam.

AFFIRMED.

McCord, Ervin, and Shaw, JJ., CONCUR.

APPENDIX J

ORDER DENYING PETITION FOR REHEARING

IN THE
DISTRICT COURT OF APPEAL
FIRST DISTRICT
Tallahassee, Florida 32301
Telephone No.: (904) 488-6152

No. AE-346

THOMAS FANNON
and
WILLIAM EDWARDS,
Appellants/Petitioners,

v.

STATE OF FLORIDA,
Appellee/Respondent.

March 1, 1982

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

The following action was taken in the above-styled case on the above date:

Motion for Rehearing denied.

[SEAL] By Order of the Court
Raymond E. Rhodes, Clerk

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following: John Yetter, Esq., Tallahassee, FL; Robert P. Foley, Esq., W. Palm Beach, FL; E. Thomas Maxwell, Esq., Baltimore, MD; Lawrence Kaden and Carolyn Snurkowski, Assistant Attorneys General, Tallahassee, FL.

/s/ Sandra Joyner
Deputy Clerk

APPENDIX K

TESTIMONY OF THE DISPATCHER (MARTHA SADOUSKY) REGARDING THE ANONYMOUS TELEPHONE TIP (RECORD OF HEARING ON MOTION TO SUPPRESS EVIDENCE, pp. 74-75)

Q. What do you recall that tip saying?

A. The call came in, as best I can remember—I can't recall the exact time. It was four twenty something that the call came in from the subject. And he asked for the—it was a man—and he asked for the highway patrol. The call came in on 911, and it was a simple procedure of flipping the switch and ringing the buzzer, and it rings the bell at the patrol station.

Q. What did he say?

A. So I passed him to the highway patrol, and it was not busy. And it was just normal that we listen in because the highway patrol and the police department and the sheriff's department back each other up. And I listened in, and he was reporting to the highway patrol that a van-type truck came out of the Yates Creek grade with no headlights on and did not come to a stop, but was headed toward town on the beach road. He requested that a unit be dispatched to check out this suspicious vehicle. He advised that there was other vehicles going in and out of that road, and it just didn't seem right to him. And he requested that we check it out.

So the highway patrol—that fell back to us to do that. So they buzzed me back; the dispatcher that was on duty buzzed me back on 911, and I told him I was on the line and took the information. I dispatched Bob Holly,

who was TC-4 at the time, to be en route to intercept the vehicle and check it out, and he did. I was in the process of doing that when the subject called back again.

Q. What did he say that time?

A. He said that another truck very much like the other one, a van-type truck, came out with its lights off and was headed towards town, too; that it was just going to be a few minutes behind the other one.

Well, Bob Holly was the only deputy I had on duty that night. David Culpepper was my acting chief deputy at the time, so I called him to find out who to call out to check out the second vehicle. And he said, being as how I had him already awake, he would take care of it. He got up and got 10-8 and went to check out the second one.

* * *

APPENDIX L

TESTIMONY OF

DEPUTY DAVID CULPEPPER REGARDING HIS REASON FOR STOPPING THE TRUCK DRIVEN BY PETITIONER FANNON. (RECORD OF HEARING ON MOTION TO SUPPRESS EVIDENCE, pp. 10, 19-20, 29-30)

[By the Prosecutor]

Q. As you turned down the beach road, what did you do next?

A. Well, Deputy Holly asked me to stop. I told him I was going on down and intercept the other vehicle. As I approached the beach road from the southbound lane of Nineteen, I observed a large truck turn left from the beach road into the northbound lane of U.S. Nineteen. I made a turn. And there was no other traffic on the highway at that time. I made the turn and began to follow this vehicle.

Q. How fast was it operated?

A. The truck was running approximately forty-five miles an hour, and he was weaving, not real bad, but I did observe him cross over the center line five or six times between there and the point we stopped him.

Q. Where did you stop him?

A. Just above where Deputy Holly had stopped his vehicle.

Q. And how close were the two trucks, approximately, once they were both stopped?

A. A hundred or two hundred feet apart.

Q. Why did you stop the truck you stopped?

A. For weaving across the highway.

* * *

[By Defense Counsel]

Q. At any time did any law enforcement office issue Fannon a traffic ciation?

A. Not to my knowledge, no, sir.

Q. How far did you follow the defendant Fannon's truck north on U.S. Nineteen?

A. From the beach road—from the intersection of the beach road and U.S. Nineteen to the point where the vehicle was stopped, which is approximately three miles. I don't recall the exact distance of it.

Q. Were you in a marked patrol car?

A. No, sir.

Q. Were you in uniform?

A. No, sir, I didn't wear a uniform.

Q. And you did not have a flashing blue light?

A. No, sir.

Q. You did not use any siren?

A. No, sir.

Q. Following defendant Fannon's vehicle, you said it crossed the center line. Or did it cross from one lane to the other in the northbound lanes?

A. It crossed the center line over into the other lane. I would say three or four feet. He did this five or six times.

Q. Would you describe that highway for the record here. How was it marked between the period when you got in behind him and when you eventually stopped him?

A. It's a four-lane highway with two lanes going north and two going south. The center of the lanes are marked with yellow marking paint.

Q. Is it a double yellow line indicating no passing?

A. No, sir, not on a four-lane highway. You wouldn't have that.

* * *

[By Defense Counsel]

Q. Mr. Culpepper, again, directing your attention to November 18, 1980, at approximately four thirty a.m., I assume you were asleep at this time. Correct?

A. Yes, sir.

Q. And this telephone call came in from the dispatcher. And as I understand, the basis of your information received from her was that she had received a telephone call that two trucks with their lights off were leaving the Yates Creek area. Correct?

A. Yes.

Q. And this was the sole basis of your information that you received from your dispatcher. Correct?

A. Yes, sir.

Q. And on the basis of this, you then left your house. Correct?

A. Yes, sir.

Q. And on the basis of having received this information, it was your intention to stop these trucks. Right?

A. It was my intentions to surveil the trucks.

Q. Surveil the trucks?

A. Yes.

Q. Take it one step further. Was it not your intention to stop the trucks?

A. If I had probable cause to stop them, yes.

Q. All right. Now, let's assume these trucks proceeded up the road and the truck that you had a hand in stopping hadn't crossed the center line, as you put it. Would you have stopped that truck?

A. Well, I don't know. I would have had to make that decision then. But the fact is he did cross the center line, so that answered my question for me.

* * *

APPENDIX M

TESTIMONY OF DEPUTY DAVID CULPEPPER AND STIPULATION OF THE STATE THAT THE TRUCK WHICH CULPEPPER STOPPED WAS THE GREEN GMC TRUCK. (RECORD OF HEARING ON MOTION TO SUPPRESS EVIDENCE, pp. 21-23)

[By Defense Counsel]

Q. What type of truck was [Fannon] driving?

A. A large van-type vehicle.

Q. Did it have any markings on it?

A. Not that I can remember. It was—I believe it was a green GMC truck.

Q. Would you describe that bumper on the large green truck for us?

A. It was a—best I can remember, it was an aluminum-type bumper with a step where you stepped up on it.

Q. Do you know what type plates were on the green truck?

A. I beg your pardon?

Q. What type of license plates were on the green truck, sir?

A. I believe it was a Georgia license plate.

Q. Now, the truck that Holly had stopped, would you describe that truck, sir?

A. I believe it was a Jartran rental truck.

Q. Jartran?

A. Yes, sir. There were two vehicles: One of them was a Jartran rental truck, and one was a GMC large truck with no markings at all.

MR. FOLEY [Defense Counsel]: Your Honor, may this be marked for identification?

THE JUDGE: [Marking exhibit.]

Q. Officer, I show you Defendants' Exhibit No. 1, marked for identification, and ask you to examine that.

A. Yes, sir.

Q. Would you tell Judge Peach what that—do you recognize that, sir?

A. It looks like the same truck, yes, sir.

Q. Which truck, sir?

A. One of the trucks we stopped that morning.

Q. Is that the large green truck that Fannon was driving?

A. Hmm, I'm not sure. It's a similar truck. It looks like the same truck, yes, sir.

Q. Do you have your notes as to the license number and so forth?

A. I don't have access to the files any more.

Q. Why is that?

A. Because they belong to the Sheriff's Department.

Q. And you are no longer with the Taylor County Sheriff's Department?

A. No.

MR. FOLEY: Judge, I would offer this into evidence for the purpose of this hearing.

MR. MCKEEVER [The Prosecutor]: Well, if you can give us some predicate.

THE JUDGE: I haven't heard anything—

MR. MCKEEVER: I haven't either.

THE JUDGE: —that connects it in.

BY MR. FOLEY:

Q. Will you show us the step on Fannon's truck that you observed the marijuana on?

A. Well, if this is the truck that Fannon was driving—

THE JUDGE: He just said that it looks like it. Let's get to the description of . . .

MR. MCKEEVER: Maybe we can clear this up faster.

[Whereupon, there was an off-the-record discussion.]

MR. MCKEEVER: We will stipulate that that's Fannon's truck.

* * *

APPENDIX N

TESTIMONY OF

DEPUTY LAWTON HOLLEY REGARDING HIS REASON FOR STOPPING THE TRUCK DRIVEN BY PETITIONER EDWARDS AND THAT IT WAS THE GREEN GMC TRUCK. (RECORD OF HEARING ON MOTION TO SUPPRESS EVIDENCE, pp. 49-50)

[By the Prosecutor]

Q. What did you find when you arrived at the beach road as far as the trucks were concerned?

A. When I turned down the beach road, I intercepted this GMC truck. It appeared to be white. The cab of the truck appeared to be white in the dark, but it had a light bluish-greenish tint like it had been painted over.

Q. Does that exhibit in front of you, Defense Exhibit No. 1, appear to be the same truck that you stopped?

A. Yes, sir.

Q. What did you do when you saw the truck?

A. I passed the truck, and I noticed in my rear-view mirror that the tail lights on the back was going on and off. I turned around and was going to follow the truck far enough that I know exactly how the tail lights is acting, cutting up, on and off and one and the other, and occasionally they would both of them be off at the same time, so I would know what to tell the driver when I stopped him.

Q. All right. How long did you follow that truck?

A. I followed him approximately five miles.

Q. Were you in communication with any other officers during that following?

A. Towards the—just before I stopped the truck I had communication with Chief Deputy David Culpepper.

Q. What did he say?

A. I told him that the lights—I mentiond the lights. I was going to stop the truck. And he asked me to stop the truck, and he would be back in just a minute.

Q. And did you stop it?

A. Yes, sir.

* * *

APPENDIX O

SECTION 893.135 OF THE FLORIDA STATUTES (1981)

SECTION 893.135 of the Florida Statutes (1979)

893.135 Trafficking; mandatory sentences; suspension or reduction of sentences.–

(1) Except as authorized in this chapter or in chapter 500:

(a) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, in excess of 100 pounds of cannabis is guilty of a felony of the first degree, which felony shall be known as "trafficking in cannabis." If the quantity of cannabis involved:

1. Is in excess of 100 pounds, but less than 2,000 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $25,000.

2. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of 5 calendar years and to pay a fine of $50,000.

3. Is 10,000 pounds or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $200,000.

(b) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine or of any mixture containing cocaine, as described in s. 893.03(2)(a), is guilty of a felony of the

first degree, which felony shall be known as "trafficking in cocaine." If the quantity involved:

1. Is 28 grams or more, but less than 200 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $50,000.

2. Is 200 grams or more, but less than 400 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 5 calendar years and to pay a fine of $100,000.

3. Is 400 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $250,000.

(c) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 4 grams or more of any morphine, opium, or any salt, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b) or (2)(a), or 4 grams or more of any mixture containing any such substance, is guilty of a felony of the first degree, which felony shall be known as "trafficking in illegal drugs." If the quantity involved:

1. Is 4 grams or more, but less than 14 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $50,000.

2. Is 14 grams or more, but less than 28 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 10 calendar years and to pay a fine of $100,000.

3. Is 28 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 25 calendar years and to pay a fine of $500,000.

(2) Notwithstanding the provisions of s. 948.01, with respect to any person who is found to have violated this section, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall such person be eligible for parole prior to serving the mandatory minimum term of imprisonment prescribed by this section.

(3) The state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if he finds that the defendant rendered such substantial assistance.

APPENDIX P

DECISION OF THE FLORIDA SUPREME COURT IN *STATE v. BENITEZ*, 395 So. 2d 514 (Fla. 1981)

ENGLAND, Justice.

This case comes to us on direct appeal from a trial court order determining that section 893.135, Florida Statutes (1979)—Florida's newly-enacted "drug trafficking" statute—is unconstitutional.

After Carlos and Esperanza Benitez attempted to sell one kilo of cocaine to undercover narcotics agents for $44,000, they were charged by information with "trafficking in cocaine" in violation of section 893.135. In ruling on motions to dismiss the charges, the trial court entered a lengthy order declaring section 893.135 to be facially invalid on a multiplicity of grounds. The state appeals that order, urging error in each of the trial court's rulings.

Section 893.135 is a unique response to a serious and growing concern of the legislature regarding illegal drug activities in the State of Florida. Subsection (1) of the new law establishes severe mandatory minimum sentences for trafficking in various types of illegal drugs. Subsection (2) prevents the trial court from suspending, deferring or withholding the adjudication of guilt or the imposition of sentence on a person convicted under the law, and it eliminates the defendant's eligibility for parole during the minimum mandatory sentence. Subsection (3) provides an "escape valve" from the statute's rigors, based on the initiative of the prosecuting attorney, by permitting the court to reduce or suspend a sentence if a convicted defendant is willing to cooperate with law

enforcement authorities in the detection or apprehension of others involved in drug trafficking.

Section 893.135 was enacted to assist law enforcement authorities in the investigation and prosecution of illegal drug trafficking at all levels of distribution, from the importer-organizer down to the "pusher" on the street. The harsh mandatory penalties of subsection (1), ameliorated by the prospect of leniency in subsection (3), were clearly calculated to provide a strong incentive for drug violators to cooperate with law enforcement authorities and become informers. No one argues that the elimination of illegal drug traffic is not a beneficial and worthwhile goal, or that the goals of this legislation are not meritorious.

Nonetheless, in their zeal to combat the flow and distribution of illegal drugs through this novel legislation, legislators knowingly glossed over alleged constitutional defects in the approach that was being developed. We in the judiciary do not have that luxury. Indeed, the trial judge's extensive and detailed order exhibits the multiple, serious difficulties which this statute poses under well-established constitutional principles. We discern six major challenges to the constitutionality of section 893.135, one directed at the mandatory penalties and five directed at the escape valve in subsection (3). The state also half-heartedly challenges the appellees' standing for the first time on this appeal. This last challenge being the easiest to treat, we discuss it first.

1. *Standing*

The basic rule governing the standing of parties challenging statutory enactments was recently stated in *Sandstrom v. Leader*, 370 So. 2d 3, 4 (Fla. 1979):

> Fundamental constitutional principles dictate that one may not challenge those portions of an enactment which do not adversely affect his personal or property rights. . . . Such a personal stake in the outcome of the controversy is necessary "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions[.]" (citations omitted).

The state argues that, because appellees have not yet been convicted, they have no personal stake in this penalty-oriented statute.

To state the assertion is to demonstrate its absurdity. A party subject to criminal prosecution clearly has a sufficient personal stake in the penalty which the offense carries. This is wholly unlike cases in which criminal defendants have challenged portions of a statute which have nothing to do with their prosecution. *See State v. Millington*, 377 So. 2d 685 (Fla. 1979); *State v. Champe*, 373 So. 2d 874 (Fla. 1978).

2. *Cruel and Unusual Punishment*

Appellees argue that the mandatory minimum sentences of section 893.135(1) violate the cruel and unusual punishment clauses of the state[1] and federal[2] constitutions. Relying on various death penalty decisions of the United States Supreme Court,[3] they first contend

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[1]Art. 1, § 17, Fla. Const.

[2]U.S. Const. amend. VIII.

[3]*Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S. Ct. 3001, 49 L. Ed. 2d 974 (1976).

that the mandatory minimum sentences unconstitutionally eliminate the exercise of discretion in sentencing. This argument was rejected by this Court in *McArthur v. State,* 351 So. 2d 972 (Fla. 1977), and warrants no further discussion here.

Appellees also argue that the mandatory sentences in section 893.135 constitute cruel and unusual punishment since they are unnecessarily severe and disproportional to the nature of the crime. This Court has consistently upheld minimum mandatory sentences, regardless of their severity, against constitutional attacks arguing cruel and unusual punishment. *See, e.g., McArthur v. State,* 351 So. 2d 972 (Fla. 1977); *Banks v. State,* 342 So. 2d 469 (Fla. 1976); *O'Donnell v. State,* 326 So. 2d 4 (Fla. 1975). The dominant theme which runs through these decisions is that the legislature, and not the judiciary, determines maximum and minimum penalties for violations of the law. While it is often said that in an extreme case—wherein the sentence was *grossly* disproportionate to the severity of the crime—the legislature's judgment would run afoul of the constitutional prohibition, this Court has never addressed such a situation in the context of statutory sentencing minima.

The recent decision of the United States Supreme Court in *Rummel v. Estelle,* 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980), indicates that similar considerations prevail under the federal constitution. In that case, the Court held that a mandatory life sentence imposed on the petitioner pursuant to a Texas recidivist statute did not constitute cruel and unusual punishment under the eighth amendment. The majority's analysis of this area noted that:

> [t]his Court has on occasion stated that the Eighth Amendment prohibits imposition of a

> sentence which is grossly disproportionate to the severity of the crime. . . . In recent years this proposition has appeared most frequently in opinions dealing with the death penalty. . . . Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishment to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel.
>
> Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.

Id., 445 U.S. at 271, 100 S. Ct. at 1138 (citations omitted). After analyzing one of these rare successful challenges, *Weems v. United States*, 217 U.S. 349, 30 S. Ct. 544, 54 L. Ed. 793 (1910), the majority concluded:

> Given the unique nature of the punishments considered in *Weems* and in the death-penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.

Id., 445 U.S. at 273, 100 S. Ct. at 1139 (footnote omitted).

The penalties imposed by section 893.135 are certainly severe, but they are by no means cruel and unusual in light of their potential deterrent value and the seriousness of the crime involved. *See McArthur v. State*; *O'Donnell v. State*; *accord, People v. Broadie*, 37 N.Y.2d 100, 371 N.Y.S.2d 471, 332 N.E.2d 338, *cert. denied*, 423 U.S. 950, 96 S. Ct. 372, 46 L. Ed. 2d 287 (1975).

3. *Due Process-Vagueness*

Little discussion is needed concerning appellees' suggestion that subsection (3) is impermissibly vague in defining a convicted defendant who is eligible for lenient treatment as "any person . . . who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals." Being a description of a *post-conviction* form of plea bargaining rather than a definition of the crime itself, the phrase "substantial assistance" can tolerate subjectivity to an extent which normally would be impermissible for penal statutes. *Cf. Linville v. State*, 359 So. 2d 450 (Fla. 1978) (statutory definition of proscribed activity held unconstitutionally vague). The contested phrase, in any event, is susceptible of common understanding in the context of the whole statute. *Schultz v. State*, 361 So. 2d 416 (Fla. 1978). There is no due process infirmity.

4. *Equal Protection*

Appellees' suggestion that subsection (3) denies equal protection of the law to convicted defendants who cannot provide "substantial assistance" to law enforcement officials is patently without merit. This legislation manifestly passes the rational basis test. *See Hamilton v. State*, 366 So. 2d 8 (Fla. 1978).

5. *Separation of Powers*

Two basic arguments by appellees are directed at Florida's constitutional separation of governmental powers. Art. II, § 3, Fla. Const. First, they assert that subsection (3) encroaches on the Court's rulemaking role, Art. V, § 2(a), Fla. Const., in that it conflicts with

Rule 3.800(b), Rule 3.720(b), and Rule 3.171 of the Florida Rules of Criminal Procedure. The statute differs from these rules, of course, but it in no way so conflicts with them as to offend the constitution.

Rule 3.800(b) permits the reduction of legal sentences, yet since it specifically excludes minimum mandatory sentences from its operation, its procedures obviously are not incompatible with section 893.135. Likewise, Rules 3.720(b) and 3.171 do not pose any obstacle to the operation of section 893.135. Rule 3.720(b) provides that at a sentencing hearing, the court shall "[e]ntertain submissions and evidence by the parties which are relevant to the sentence. . . ." Subsection (3) states that "[t]he arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any [motion for reduction or suspension of sentence]." The statute does not explicitly exclude the defendant from submitting evidence in his behalf, and it does not offend the statutory scheme to afford him that right. Finally, applicable procedural safeguards in Rule 3.171 can be afforded to defendants, to the extent they do not conflict with the explicit langauge of subsection (3). No infirmity of constitutional dimension attends the omission of those that do.

Appellees' second argument premised on the constitutional separation of powers is that subsection (3) usurps the sentencing function from the judiciary and assigns it to the executive branch, since the benefits of subsection (3) are triggered by the initiative of the state attorney. Under the statute, the ultimate decision on sentencing resides with the judge who must rule on the motion for reduction or suspension of sentence. "So long as a statute does not wrest from courts the *final* discretion to impose sentence, it does not infringe upon the consti-

tutional division of responsibilities." *People v. Eason*, 40 N.Y.2d 297, 301, 386 N.Y.S.2d 673, 676, 353 N.E.2d 587, 589 (1976) (emphasis in original) (rejecting a separation of powers attack on a similar provision in New York's drug laws).

6. *Self-incrimination*

Finally, the appellees argue that section 893.135 coerces a defendant into relinquishing his fifth amendment privilege against self-incrimination by denying him sentencing leniency unless he cooperates with the authorities. We reject this argument, primarily because it depends on unwarranted assumptions about the nature of the informer's disclosures. Nothing in the statute suggests that "substantial assistance" must incriminate the defendant of crimes other than those for which he has already been convicted (and for which no fifth amendment privilege is obviously necessary). We acknowledge the risk of prosecution in other jurisdictions. Nonetheless, a defendant need not invoke subsection (3), as nothing in the statute is compulsive. Putting a defendant to a difficult choice is not necessarily forbidden by the fifth amendment. *See, e.g., Corbitt v. New Jersey*, 439 U.S. 212, 218, 99 S. Ct. 492, 497, 58 L. Ed. 2d 466 (1978) ("[N]ot every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid." (footnote omitted)); *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978); *McGautha v. California*, 402 U.S. 183, 91 S. Ct. 1454, 28 L. Ed. 2d 711 (1971). No constitutional deprivation results if a defendant elects to reap the benefits of subsection (3).

With respect to those cases which say that the trial courts may not enhance a sentence based on a defend-

ant's failure to cooperate with the authorities, *see United States v. Garcia,* 544 F.2d 681 (3rd Cir. 1976); *United States v. Acosta,* 501 F.2d 1330 (5th Cir. 1974) (Gee, J., dissenting), *adopted en banc,* 509 F.2d 539 (5th Cir.), *cert. denied,* 423 U.S. 891, 96 S. Ct. 188, 46 L. Ed. 2d 122 (1975); *United States v. Rogers,* 504 F.2d 1079 (5th Cir. 1974), *cert. denied,* 422 U.S. 1042, 95 S. Ct. 2655, 45 L. Ed. 2d 693 (1975), we believe that *Roberts v. United States,* 445 U.S. 552, 100 S. Ct. 1358, 63 L. Ed. 2d 622 (1980), went a long way toward resolving this issue against appellees. The Court in *Roberts* concluded that the district court properly considered the defendant's refusal to cooperate as one factor in imposing consecutive sentences. Admittedly, a fifth amendment claim was not properly raised in *Roberts* and "would have merited serious consideration" if it had been. *Id.* at 559, 100 S. Ct. at 1364. We conclude, however, that for fifth amendment purposes the situation in *Roberts* is distinguishable from that here. A sentence reduction obtained by a sentenced convict due to his cooperation is not tantamount to the enhancement of a sentence imposed on an unsentenced, but convicted defendant as a result of his lack of cooperation. The former is no different from a gratuitous sentence reduction offered to one already incarcerated who, even without statutory sanction, risks reincrimination in exchange for early release benefits.

Our disposition of appellees' challenges obviates the need to consider the severability of subsection (3) from the statute. We hold that section 893.135 is constitutional. The order of the trial court is reversed, and the case is remanded for further proceedings.

SUNDBERG, C.J., and ADKINS, BOYD, OVERTON, ALDERMAN and MCDONALD, JJ., concur.

APPENDIX Q

DECISION OF THE FLORIDA SUPREME COURT IN *STATE v. WERNER*, 402 So. 2d 386 (Fla. 1981)

ENGLAND, Justice.

Robert K. Werner and Jack E. Carlson were charged by information with trafficking in cocaine in violation of section 893.135, Florida Statutes (1979). This appeal comes to us under article V, section 3(b)(1), of the Florida Constitution (1972), from an order of the trial court granting their motions to dismiss the charges against them and declaring the statute unconstitutional.

All but one of the issues presented by this appeal were resolved against Werner and Carlson in *State v. Benitez*, 395 So. 2d 514 (Fla. 1981), and *State v. Yu*, 400 So. 2d 762 (Fla. 1981). The one unresolved issue they raise is whether the term "may" in section 893.135(3) is unconstitutionally vague, since it vests the prosecutor with unbridled discretion when engaging in so-called "post-conviction information bargaining." Subsection (3) provides that "[t]he state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals." Werner and Carlson claim that this provision leaves open the possibility that a prosecutor might secure "substantial assistance" from the defendant, and yet not live up to his side of the bargain by moving for a reduction or suspension of the sentence. While their concerns may be sincere, they do not provide a constitutional basis to invalidate the enactment.

State attorneys are "the prosecuting officer[s] of all trial courts" under our constitution[1], and as such must have broad discretion in performing their duties. Discretion to initiate the post-conviction information bargaining process is inherent in the prosecutorial function. Absent a clear constitutional violation in a particular factual context, we refuse to intrude on the prosecutorial function by holding subsection (3) unconstitutional on its face.

Additionally, section 893.135 does not directly abrogate the substantive rules of law governing plea bargaining and plea arrangements[2], and these rules should be followed, to the extent they can in a post-conviction context, by the parties and the trial judge. Good faith compliance with rules governing the plea bargaining process will prevent prosecutorial overreaching and alleviate any possible constitutional infirmities which might plague the unique procedure established by subsection (3).

The order of the trial court is reversed, and the case is remanded for further proceedings.

It is so ordered.

SUNDBERG, C.J., and ADKINS, BOYD, OVERTON, ALDERMAN and MCDONALD, JJ., concur.

---

[1] Art. V, § 17, Fla. Const.

[2] *See, e.g., Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663, 54 L. 2d. 2d 604 (1978); *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); Fla. R. Crim. P. 3.170 & 3.171.

APPENDIX R

EXCERPT FROM

PETITIONERS' MEMORANDUM OF LAW FILED IN THE TRIAL COURT IN SUPPORT OF THE MOTION TO SUPPRESS EVIDENCE, pp. 6-8.

B) Traffic Arrests Used As Pretext

Assuming arguendo that the anonymous tip was not sufficiently detailed and corroborated to justify the stop of the Defendant, it is anticipated that the State will attempt to support the stop of the Defendants as the basis of alleged traffic violations. However, it is well established that police may not use a traffic violation as a "pretext" to conduct an otherwise illegal stop and search. *State v. Holmes,* 256 So. 2d 32 (Fla. 2d DCA 1971).

In the instant case, Chief Deputy Sheriff Culpepper stated that he ordered the two trucks stopped. The first truck was ordered stopped for faulty taillights, which, according to Culpepper, was a "Jartran" truck. (Culpepper Deposition, p. 6). However, according to Deputy Sheriff Holley, the truck with the faulty taillights was a GMC, light blue, moving van-type truck (Holley Deposition, p. 7). Culpepper, with the assistance of a marked patrol car, stopped the second truck for allegedly weaving from the right hand to the passing lane of a four lane highway (Culpepper Deposition, p. 68). Culpepper admitted that he is not normally engaged in the enforcement of traffic laws. Furthermore, there were no traffic citations ever issued against any of the Defendants. (Culpepper Deposition, pp. 15, 17, 38, 42).

In *Graham v. State,* 60 So. 2d 186 (Fla. 1972), defendant's car was stopped because the police officer

observed the defendant cross the center line of a two-way highway two or three times. Our Florida Supreme Court held that the stop of the defendant was unlawful.

> Reading Deputy Williams' testimony in its most favorable light to sustain the arrest for reckless driving, there is no escaping the conclusion that he was waiting beside the road for this particular appellant to come by and he used reckless driving as an excuse and not for a lawful cause for stopping defendant and placing her under arrest. No charge was ever made against the defendant for reckless driving except the verbal charge made by the deputy at the time of arrest on the road. When appellant was taken to jail Deputy Williams said nothing about a charge agasint her for reckless driving and Williams testified that he did not have time "to stay there any longer and book her myself".

Id., at 187.

Other decisions have emphasized the absence of a traffic citation as evidence of a pretextual traffic arrest. In *State v. Rheiner*, 297 So. 2d 130, 133 (Fla. 2d DCA 1974), the Court stated:

> The factual basis for a claimed legal arrest in this case is not as strong as that in the case of *Graham v. State*, 60 So. 2d 186, wherein the Supreme Court of Florida held the arrest to have been illegal. In the Graham case there was at least a charge of a traffic violation. Similarly, there was a charge of a traffic violation in the case of *Riddlehoover v. State*, 198 So. 2d 651, wherein the District Court of Appeals Third District made the following statement:
>
> > "Where the primary purpose of an arrest appears to have been a pretext for making an unrelated exploratory search of the defendant, or his car, the search is not justified."

Id., at 133.

In *Diggs v. State*, 345 So. 2d 815 (Fla. 2d DCA 1977), the Second District Court of Appeal held the search of a vehicle following a stop on alleged suspicion that the driver had no driver's license to be illegal. The Court stated:

> A minor traffic violation cannot be used as a pretext to search a vehicle for evidence of other crimes. *Urquhart v. State*, 261 So. 2d 535 (Fla. 2d DCS 1971). The test for determining whether a traffic arrest which is the basis for seizure of evidence of a serious crime is a "pretext" for the search, as set forth in *State v. Holmes*, 256 So. 2d 32 (Fla. 2d DCA 1971), is whether the facts in the case suggest the strong possibility that the arrest was one which would have been made by a traffic officer on routine patrol against any citizen driving in the same manner or whether the arrest was one which would not have been made but for some other motive of the arresting officer.

Id., at 816.

A similar result was reached in *Harding v. State*, 301 So. 2d 513 (Fla. 2d DCA 1974). In suppressing the evidence as discovered pursuant to a pretextual arrest, the Court stated:

> None of the deputies involved was normally engaged in executing municipal traffic warrants. Moreover, they testified that it was most unusual, if not unheard of, that deputy sheriffs in Pinellas County *ever* served a city traffic warrant, and certainly never within the boundaries of the issuing city. In short, the arrest cannot be described as one which would have been accomplished by any Pinellas County deputy sheriff routinely acting in reasonable pursuit of his usual and normal duties, a criterion applied in *State v. Holmes*.

Id., at 514.

Based upon the above decisions and the facts sub judice, the traffic stops of the Defendants were unlawful:

(1) The police involved sub judice admitted they suspected the trucks were transporting marijuana. (*Diggs, supra,* and principle of "ulterior motive");

(2) Chief Deputy Sheriff Culpepper was not normally involved in enforcing traffic violations, and consequently, the other officers involved in the stops were acting merely at Culpepper's directions. *Harding, supra* (ordinary duties of Culpepper);

(3) No traffic citations were issued sub judice. (*Graham, supra,* and *Rheiner, supra.*)

* * *

Opposition

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No. 81-2021

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

THOMAS FANNON and WILLIAM JEFFREY EDWARDS

Petitioners,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether law enforcement officers who base a traffic stop upon a reasonable and articulable suspicion that a traffic violation has occurred violate a defendant's fourth amendment right to be free from unreasonable searches and seizures?

2. Whether the Florida Drug Trafficking Law, §893.135, Florida Statutes, which allows a prosecutor to mitigate a defendant's otherwise mandatory minimum sentence if substantial assistance is provided to law enforcement officers, violates the fifth amendment privilege against self-incrimination and the due process clause of the Fourteenth Amendment?

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STATEMENT OF THE CASE

Respondent accepts Petitioner's statement of the case so far as it outlines and characterizes the legal proceedings. However, the statement of facts is not written in a light most favorable to sustain the trial court's rulings and is unacceptable. The transcript of the hearing on the Motion to Suppress is being forwarded to this Court by Florida's First District Court of Appeal. Citations to that transcript will be made by use of the symbol "T," followed by the appropriate page number.

At the hearing on the Motion to Suppress on April 2, 1981, Chief Deputy Sheriff James Culpepper of the Taylor County, Florida, Sheriff's Office testified that on November 18, 1980, he had received a telephone call about 4:30 a.m. from his

dispatcher who said that she had received an anonymous phone call that two large trucks had been seen leaving the Yates Creek area and that these trucks had their lights off (T-7, 8). He testified that the Yates Creek area of Taylor County was a wooded area along the coast and that it had been used for drug smuggling on at least one previous occasion (T-8). Culpepper decided to place the vehicles under surveillance (T-9). Another deputy then advised Culpepper that he had one of the trucks under surveillance and that the truck had its headlights on but that the tail lights were not working properly. Culpepper advised this deputy to stop the truck on a traffic violation (T-9). Deputy Culpepper then made contact with the second truck, and he testified that he observed the truck weave and cross over the center line five or six times (T-10). Deputy

Culpepper specifically stated that he stopped the truck "[f]or weaving across the highway." (T-11). Culpepper had called another police officer to stop the vehicle because Culpepper's blue light was not working. Petitioner Fannon was driving the truck. Culpepper approached Fannon and identified himself as a police officer and asked Fannon for his driver's license. Fannon did not have a driver's license and Culpepper then arrested him for not having a driver's license (T-11, 12). Culpepper immediately smelled a strong odor of marijuana, and he observed marijuana in plain view on the bumper of the truck (T-12).

On cross-examination, Culpepper testified that he did not know if he would have stopped the truck if it had not crossed the center line (T-31). He further stated that it was not normal for that type

of truck to be in that area at any time because there were no businesses, fish houses, or produce markets in the area (T-31). Culpepper further testified that he had told Petitioner Edwards, who was in the truck stopped by Deputy Holley, that Edwards would be arrested on a traffic violation although he wasn't sure if he specifically told Edwards that it would be for faulty equipment (blinking tail lights)(T-34). Culpepper stated that the passenger in Edwards' truck looked like he had been "playing in a hay field" and that he had marijuana all over him (T-15, 37).

Taylor County Deputy Sheriff Lawton Holley then testified and generally corroborated Culpepper's testimony. He stated that it was unusual to find two trucks of the size driven by Fannon and Edwards in the area so early in the morning (T-50), and he testified that the tail

lights on the truck he stopped were blinking on and off and occasionally both would be off at the same time (T-51). He followed the truck approximately five miles before he notified Culpepper that he was going to stop the truck. He further testified that after the truck was stopped he made Petitioner Edwards come around the back of the truck so that he could show Edwards how the tail lights were not operating properly (T-52). However, at that time he noticed marijuana residue and smelled marijuana (T-52).

Martha Sadousky, the Dispatcher at the Taylor County Sheriff's Office, testified and generally corroborated the previous testimony of Culpepper and Holley. She stated that she had overheard on the radio Deputy Holley tell Deputy Culpepper that the tail lights on the truck he was following were malfunctioning and

that Holley was going to stop the truck for that reason (T-78). She also said that Culpepper had advised Holley that he had contacted the other vehicle and the other vehicle appeared to be weaving and that he was going to pull the vehicle over and check it (T-78).

The Motion to Suppress was ultimately denied. See Petitioner's appendix E. The trial court found that the arresting officers had probable cause to search the trucks and that there were exigent circumstances which obviated the need for a search warrant.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

A.

THE ARRESTING OFFICERS HAD PROBABLE CAUSE FOR STOPPING BOTH VEHICLES FOR TRAFFIC VIOLATIONS.

Petitioners have alleged that this case presents a substantial federal question in that the Court needs to outline "Fourth Amendment criteria to be applied to pretextural [sic] traffic stops." (Petitioners' Brief at 14). However, Petitioners' argument must fail for two reasons.

First, Petitioners have failed to present a substantial federal question concerning the need for this Court to establish guidelines in cases such as this because the Court has already done so on numerous occasions. In Delaware v. Prouse, 440 U.S. 648, 661, 663, (1979), the Court

discussed routine investigatory traffic stops and concluded that such stops were prohibited by the Fourth Amendment unless there was articulable probable cause to believe that a driver was violating applicable traffic and equipment regulations. Even more recently, in United States v. Cortez, 449 U.S. 411, 417 (1981), the Court reiterated that "[a]n investigatory stop must be justified by some objective manifestation that the person is, or is about to be, engaged in criminal activity." See also Brown v. Texas, 443 U.S. 47, 51 (1979); Terry v. Ohio, 392 U.S. 1, 16-19 (1968). Finally, see Gustafson v. Florida, 414 U.S. 260 (1973), in which the Court upheld a resulting search incident to arrest after the defendant had been stopped for weaving across the center line of a road three or four times. In Gustafson, the defendant

had been arrested after it was learned that he had violated Florida law which required him to have a driver's license.

The second reason Petitioner's argument must fail is that the record reveals that the traffic stops were not pretextual. Deputy Culpepper testified that he stopped Petitioner Fannon's truck "[f]or weaving across the highway." (T-11). Deputy Holley testified that he stopped Petitioner Edwards' truck because the tail lights were not operating properly (T-51). Therefore, the record conclusively refutes Petitioners' contention that the initial traffic stops were pretextual.[1]

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[1] §316.192, Florida Statutes, Reckless Driving:
(1) Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving.
(2) Any person convicted of reckless driving shall be punished:

Therefore, Petitioners have failed to present a substantial federal question because the Court has already ruled that purely investigatory stops which are not based on any type of articulable suspicion that a traffic violation has been committed or that criminal activity is occurring are prohibited by the Fourth Amendment.

([1]Continued)
(a) Upon a first conviction, by imprisonment for a period of not more than 90 days or by fine of not less than $25 nor more than $500, or by both such fine and imprisonment.
(b) On a second or subsequent conviction, by imprisonment for not more than 6 months or by a fine of not less than $50 nor more than $1,000, or by both such fine and imprisonment.

§316.1925, Florida Statutes, Careless Driving:
(1) Any person operating a vehicle upon the streets or highways within the state shall drive the same in a careful and prudent manner, having regard for the width, grade, curves, corners, traffic, and all other attendant circumstances, so as not to endanger the life, limb, or property of any person. Failure to drive in such manner shall constitute careless driving and a violation of this section.

Moreover, Petitioners' argument must also fail because the record refutes their contention that the stops were pretextual.

([1]Continued)
(2) Any person found guilty of careless driving shall be punished as provided in s.316.655.

§316.231, Florida Statutes, Lamps on other vehicles and equipment:
Every vehicle, including animal-drawn vehicles and vehicles referred to in s.316.215(3), not specifically required by the provisions of this section to be equipped with lamps or other lighting devices shall at all times specified in s.316.217 be equipped with at least one lamp displaying a white light visible from a distance of not less than 1,000 feet to the front of said vehicle, and shall also be equipped with two lamps displaying red light visible from a distance of not less than 1,000 feet to the rear of the vehicle, or, as an alternative, one lamp displaying a red light visible from a distance of not less than 1,000 feet to the rear and two red reflectors visible from all distances of 600 to 100 feet to the rear when illuminated by the lawful lower beams of headlamps.

B.

FLORIDA'S DRUG TRAFFICKING LAW DOES NOT VIOLATE THE FIFTH AND FOURTEENTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION AND RIGHT TO DUE PROCESS OF LAW.

Petitioners next allege that Florida's drug trafficking law violates the fifth amendment privilege against self-incrimination and right to due process of law. In support of this contention, Petitioners allege that the "considerable body of appellate papers" filed in challenges to the law demonstrate that serious constitutional questions have been created and raised. Respondent cannot resist the temptation of pointing out that the fact that none of these numerous challenges have been successful demonstrates that the issue is frivolous as

a matter of law.[2] In fact, the volume of litigation indicates merely that drug trafficking defendants are financially well endowed and can afford to hire lawyers who can take cases all the way to the United States Supreme Court. In any event, regardless of the motive of such litigation, Petitioners in this case have failed to present a substantial federal

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[2]Challenges to this same statute have been unsuccessful in this Court in the following cases:
Wall v. Florida, Case No. 81-782, appeal dismissed Jan. 11, 1982; Blalock v. Florida, Case No. 81-712, appeal dismissed Jan. 11, 1982; Clarke v. Florida, Case No. 81-824, cert. denied Mar. 22, 1982; Locke v. Florida, Case No. 81-960, dismissed for want of a substantial federal question Mar. 1, 1982; Leicht v. Florida, Case No. 81-836, cert. denied Mar. 1, 1982; Alander v. Florida, Case No. 81-423, cert. denied Jan. 25, 1982; Smith v. Florida, Case No. 81-1351, dismissed for want of jurisdiction May 3, 1982, Ragno v. Florida, Case No. 81-1310, dismissed for want of jurisdiction Apr. 26, 1982.

question concerning the constitutionality of the drug trafficking law.[3]

Petitioners first allege that law violates their privilege against self-incrimination. However, this Court has previously rejected a similar claim in Roberts v. United States, 445 U.S. 552, 558-559 (1980). The Defendant, a heroin dealer, had refused to cooperate with police in further investigation of narcotics trafficking in his community, and the trial court therefore imposed a more severe sentence than if the defendant had cooperated. This Court sustained the more

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[3]The Florida Supreme Court has previously rejected constitutional challenges to the drug trafficking law in the following cases:
State ve. Benitez, 395 So.2d 514 (Fla. 1981); State v. Thebeau, 405 So.2d 973 (Fla. 1981); State v. Newman, 405 So.2d 971 (Fla. 1981); State v. Leicht, 401 So.2d 386 (Fla. 1981); State v. Yu, 400 So.2d 762 (Fla. 1981).

severe sentence and concluded that part of a defendant's rehabilitation would be cooperation with law enforcement in exposing crime in his community and that there was no basis for any claim of self-incrimination or coercion in such context. In Petitioners' case, as in Roberts, the record is devoid of any indication that Petitioners have been compelled or coerced to do anything. Indeed, the Fifth Amendment does not enter into the analysis unless testimony is both compelled and used. Lefkowitz v. Cunningham, 431 U.S 801, 804-805 (1977). Without such use against a defendant, there simply is no prohibition under the Fifth Amendment to the United States Constitution. See United States v.ManDujano, 340 U.S. 367 (1951). Furthermore, it must be emphasized that the key issue under the Fifth Amendment is not

whether a defendant has a difficult choice, but rather whether he has a choice at all. See McGautha v. California, 402 U.S. 183, 212-213 (1971); North Carolina v. Alford, 400 U.S. 25 (1970); Brady v. United States, 397 U.S. 742 (1970). Florida's Drug Trafficking Statute presents Petitioners only with a difficult choice, and therefore the statute does not violate any constitutional precepts.

Petitioners' claim that the statute denies them due process of law is equally without merit. In Bordenkircher v. Hayes, 434 U.S. 357, 359 (1978), the prosecutor during pretrial bargaining had told the defendant that he could plead to a term of five years in prison but that if the defendant did not plead guilty the prosecutor would seek an indictment against the defendant as an habitual offender, which required a mandatory life sentence.

The defendant chose not to plead guilty, and he was subsequently convicted and sentenced to life. This Court recognized that the case would not be different if the grand jury had indicted the defendant as a recidivist from the outset and if the prosecutor had offered to drop the charge as part of the plea bargain. Id. at 360. The Court recognized that a plea might be induced by promises of a recommendation of a lenient sentence or a reduction of charges. However, the Court concluded that merely confronting the defendant with a risk of a more severe punishment, while possibly discouraging his right to a trial, did not offend the Constitution. Id. at 364.

In Corbitt v. New Jersey, 439 U.S. 212 (1978), the Court relied upon Bordenkircher and concluded that the Constitution did not prohibit New Jersey

from imposing a mandatory life sentence on a defendant who went to trial on a first degree murder charge even though a mandatory life sentence was not required if the defendant had pled nolo contendere. The Court specifically noted that it was permissible for a state to encourage guilty pleas by offering substantial benefits in return for the plea.

In Petitioners' case, two choices are available after conviction. They may either serve the lawful term of their sentences, or they may seek the benefit of mitigation by substantially cooperating with law enforcement authorities. Under Corbitt, Bordenkircher, and Brady and their progeny, there simply is no constitutional disability in providing these choices -- the key is whether Petitioners have a choice, and it makes no difference under

the Constitution whether the choice is a pleasant one.

Drug trafficking is a serious crime which substantially affects the physical and economic well being of our society. The Florida Legislature has rationally concluded that by providing more severe penalties for drug trafficking crimes, such crimes might be deterred. See Massachusettes Board of Retirement v. Murgia, 427 U.S. 307 (1976); Marshall v. United States, 414 U.S. 417 (1974); Albernaz v. United States, 450 U.S. 333 (1981). As this Court has said numerous times, the determination of an appropriate sentence for a particular crime is a legislative rather than judicial function. Rummell v. Estelle, 435 U.S. 263 (1980); Hutto v. Davis, ____U.S.____, 70 L.Ed.2d 556 (1982).

CONCLUSION

Petitioners have failed to present this Court with a substantial federal question. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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